IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 4:07-cr-00049-01-JAJ

ORDER

vs.

CHARLES IRVIN TROGDON,

Defendant.

This matter comes before the court pursuant to defendant Charles Irvin Trogdon's October 19, 2007, Motion for a New Trial [dkt 89]. On October 9, 2007, defendant was convicted by a jury of conspiracy to distribute marijuana. Defendant moves for a new trial based on allegations of juror non-disclosure, false statements and newly discovered evidence.

I. <u>FACTS</u>

Darrell Black was a juror for defendant Charles Trogdon's trial. Before the trial, both parties received juror questionnaires containing juror background information. During voir dire, jurors were questioned on the subjects of family and drugs and whether such issues would prevent a juror from being fair. Furthermore, potential jurors were asked if they recognized the defendant.

Defendant moves for a new trial on two grounds. First, he alleges that a new trial is warranted based on juror non-disclosures or false statements during voir dire. Defendant alleges that Mr. Black did not disclose his pre-existing relationship with defendant. According to defendant, Mr. Black used to live next to defendant and, at one time, the defendant's wife babysat for Mr. Black's daughter. Second, defendant alleges that Mr. Black failed to disclose that his daughter is presently serving time in

prison for a drug crime and that such information should have been disclosed when jurors were questioned on the subject of family and drugs.¹ The defendant's motion states that he is trying to confirm this information. A hearing was requested to be set in early November. To date, no additional information has been provided to the court regarding this issue. Defendant contends that had he known the information alleged above, he would have struck Mr. Black from the panel. Defendant fails to explain, however, how he could have not "known" about the information at the time of jury selection, or how he "knows" it now. Defendant and his wife were both in the courtroom for the entire voir dire examination.

The second ground under which defendant seeks a new trial is allegedly newly discovered evidence regarding a person identified at trial as "Asian Chuck." Defendant alleges that, during trial, he attempted to prove to the jury that a witness, Charlie Elwell, dealt drugs with an Asian gang. Drug notes of the defendant admitted at trial revealed a debt involving a person named "Chuck". During trial, Mr. Elwell testified he did not deal drugs with Asians and that he did not know an Asian that went by "Chuck." Nevertheless, defendant now alleges that "new" photographs were found hidden with a computer disk marked "Top Secret Prowell," and the photographs show that Mr. Elwell was connected to "Asian Chuck." He does not say when or where they were found, who found them or what efforts were made prior to or during trial to discover them. According to defendant, had the jury seen the photos, "they would have been able to attribute the marijuana debt to "Asian Chuck" and, thus, lowered the quantity of marijuana defendant was found guilty of selling." The defendant makes no attempt to show why the jury would have done this or how it had the potential to reduce

¹The court has reviewed the entire transcript of the voir dire examination and no question was posed which would have required disclosure of this information.

the quantity of marijuana for which he was responsible or how it would reduce the quantity below the 1000 kilogram he was found guilty of conspiring to distribute.

II. MOTION FOR A NEW TRIAL

A. Juror False Statement or Non-Disclosure

To receive a new trial based on a juror non-disclosure or false statements, the defendant must "first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984). Thus, there must be some actual bias, because "a juror's [apparent] dishonesty is not a sufficient [predicate] to obtaining a new trial." Cannon v. Lockhart, 850 F.2d 437, 440 (8th Cir. 1988).

On the issue of Darrell Black's false statements or non-disclosure during voir dire, there is nothing in the motion to show that Mr. Black failed to answer honestly a material question during voir dire. The jury panel was asked if they recognized the defendant. The defendant has produced no evidence that Mr. Black did, in fact, recognize the defendant. Defendant's motion contains no information whatsoever as to when Mr. Black and the defendant were neighbors. Moreover, the defendant has not shown that a "correct" response on Mr. Black's part would have provided a valid basis for a challenge for cause. As pointed out by the government, the fact that Mr. Black previously had been the defendant's neighbor might suggest that Mr. Black would be more sympathetic to the defendant. Defendant has not demonstrated actual bias. The defendant has not even attempted to answer the obvious question as to why he did not recognize someone who he now claims to have been his neighbor.

Likewise, the defendant has failed to demonstrate that Mr. Black failed to answer honestly the question posed during voir dire regarding a family member's involvement

with drugs, or that an "honest" answer would have provided a valid basis for a challenge for cause. Furthermore, defendant alleges that he had only names and no other information regarding juror identity. In actuality, defendant had access to the juror questionnaires, which contained significantly more information. Defendant's motion for a new trial on the basis of juror non-disclosure or false statements is denied.

B. Newly Discovered Evidence

Under Federal Rule of Criminal Procedure Rule 33, newly discovered evidence can be grounds for a new trial. <u>FED. R. CRIM. P. 33</u>. Nevertheless, the Rule 33 remedy should be used sparingly and with caution. <u>United States v. Dodd</u>, 391 F.3d 930, 934 (8th Cir. 2004). The trial court may exercise broad discretion in considering the motion. <u>United States v. Cannon</u>, 88 F.3d 1495, 1502 (8th Cir. 1996).

To prevail on a Rule 33 motion for newly discovered evidence, a defendant must meet five requirements. <u>United States v. Pope</u>, 415 F.2d 685, 691 (8th Cir.), <u>cert. denied</u>, 397 U.S. 590 (1969); <u>see also United States v. Zuazo</u>, 243 F.3d 428, 431 (8th Cir. 2001) (finding that a defendant's failure on any of the five factors defeats a Rule 33 motion.). The requirements are:

- 1. The evidence must be in fact newly discovered, and newly discovered since the trial.
- 2. Facts must be alleged from which the court may infer diligence on the part of the movant.
- 3. The evidence relied upon must not be merely cumulative or impeaching.
- 4. The evidence must be material to the issues involved; and
- 5. The evidence must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Id.

This court has wide discretion in determining whether an evidentiary hearing is appropriate. <u>United States v. Preciado</u>, 336 F.3d 739, 747 (8th Cir. 2003). If a district court determines that the newly discovered evidence would not meet the above

requirements, an evidentiary hearing may not be necessary. <u>Id.</u> Only in "exceptional circumstances" does a district court need to hold a hearing. <u>Id.</u> As set forth above, despite the defendant's request for additional time to submit evidence in support of his allegations, nothing further has been filed. Absent any actual evidence to support the defendant's allegations, *e.g.*, affidavits, the court declines to hold a hearing on this issue.

First, the evidence must be "newly discovered." Evidence that is known before or during the trial is not "newly discovered." For example, in <u>United States v. Rogers</u>, the court held that "when a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a co-defendant, the evidence is not 'newly discovered.'" 982 F.2d 1241 (8th Cir. 1993) <u>citing United States v. Offutt</u>, 736 F.2d 1199, 1202 (8th Cir. 1984). In <u>Rogers</u>, the defendant knew the proposed testimony's contents, therefore that testimony was not "new." Similarly, the court held in <u>United States v. DiBarnardo</u> that if the defendants were "well aware" of a witness's testimony before trial, such testimony could not be deemed "newly discovered evidence." 880 F.2d 1216, 1224 (11th Cir. 1989).

The allegedly newly discovered photographs of "Asian Chuck" must meet the five requirements. They do not. First, there is no evidence, via affidavits or otherwise, that this "evidence" is, in fact, newly discovered since trial. Second, absent evidence to the contrary, this court cannot infer diligence on the part of defendant in discovering this evidence. Defendant's motion does not even state when the photographs were found. In fact, the photographs did not accompany the motion. Third, these photographs are merely impeaching. In <u>United States v. Provost</u>, the district court's denial of a new trial was upheld because the newly discovered evidence was useful only for impeachment. 921 F.2d 163 (8th Cir. 1990). That court held that "impeachment evidence is insufficient to compel the granting of a new trial." Id. at 164. Because the alleged

newly discovered photographs are only impeaching and cumulative, defendant fails this requirement. Finally, it is unlikely that this evidence, which is arguably impeachment material at best, would produce an acquittal. The defendant provides no explanation as to how these photographs, if presented to a jury, would have caused the jury to find that the conspiracy involved less than 1,000 kilograms of marijuana. It has not been shown that these photographs likely would have changed the result of the trial.

Upon the foregoing,

IT IS ORDERED

That defendant Charles Irvin Trogdon's October 19, 2007, Motion for a New Trial [dkt 89] is denied.

SOUTHERN DISTRICT OF IOWA

DATED this 30th day of January, 2008.

6